Supreme Court, U. S.
FILED
JUN 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1580

B. J. GIST, ET AL, *Petitioners*

vs.

STAMFORD HOSPITAL DISTRICT, ET AL,
Respondents

Response to Petition for Writ of Certiorari

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Response to Petition for Writ of Certiorari

The Stamford Hospital District and its Board of Directors, Respondents, respectfully file this Response to the Petition for Writ of Certiorari filed in this Honorable Court by B. J. Gist, Lem Ruark and Anita Harvey MacGregor seeking review of the judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland, Texas.

OPINION

The opinion in this cause is reported in 557 S.W.2d 556.

POINTS OF REPLY

1.

The decision of the Texas courts that an earlier suit brought by taxpayers attacking the constitutionality of an Act of the Legislature of the State of Texas

authorizing an expansion of the Stamford Hospital District upon obtaining proper voter approval and the election held on December 18, 1973 is *res judicata* of this cause brought by additional taxpayers attacking the same legislation and election on a different constitutional basis does not violate any right guaranteed the taxpayers by the Constitution of the United States.

2.

The Act of the Legislature of the State of Texas authorizing the expansion of the Stamford Hospital District upon obtaining proper voter approval and the election held on December 18, 1973 do not transcend any right of the taxpayers guaranteed to them by the Constitution of the United States.

STATEMENT OF THE CASE

The facts of this case are undisputed. These proceedings were instituted by B. J. Gist, Lem Ruark and Anita Harvey MacGregor, Petitioners herein, seeking a declaration that Chapter 563, Acts of the 63rd Legislature, Regular Session, 1973, authorizing an expansion of the Stamford Hospital District upon obtaining proper voter approval and the election held on December 18, 1973, were void because of the provisions of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and for injunctive relief against the District and its Board to prevent them from assessing or collecting any taxes on the lands and properties of the Petitioners in the expanded portion of the District (Tr. 2-15).

Respondents, the Stamford Hospital District and its Board of Directors, joined by the Attorney General of Texas filed answers raising an affirmative defense that the suits of *Billy Vinson, et al v. Stamford Hospital District, et al* previously filed in that same 104th Judicial District Court, Jones County, Texas, and numbered on that court's docket as 11757 is *res judicata* of all issues in the present cause based on the doctrine of virtual representation (Tr. 16-18, 19-21A; Supp.Tr. 3-4). Subsequently, Respondents filed a Motion for Summary Judgment with Supporting Affidavit as authorized by Rule 166-A, Texas Rules of Civil Procedure (Tr. 22-26; Supp.Tr. 7-55). Attached to the Affidavit in Support of the Motion for Summary Judgment were certified copies of the pertinent instruments from the *Vinson* case (Supp.Tr. 13-54).

The certified copies of the record from the *Vinson* case established that on August 27, 1973, Senate Bill 450 became law as Chapter 563, Acts of the 63rd Legislature, Regular Session, 1973 (Supp.Tr. 13-20). The new statute was codified as an amendment to Article 4494q, Revised Civil Statutes of Texas, and authorized an expansion of the Stamford Hospital District upon approval by a majority of the qualified electors in an election which was duly called and held by the District's Board of Directors on December 18, 1973 (Supp.Tr. 13-20). The voters approved the expansion of the District at that election (Tr. 3; Supp.Tr. 13-20).

Following the election, Billy Vinson and five other taxpayers owning property and residing in the ex-

panded portion of the Stamford Hospital District filed suit on December 29, 1973, in the 104th Judicial District Court of Jones County, Texas, against the Stamford Hospital District and its Board of Directors seeking a declaratory judgment that the statute and the election held on December 18, 1973, were void because of the provisions of Article IX, Section 9 of the Constitution of the State of Texas and for injunctive relief to prevent assessing and collecting of taxes on the lands and properties of the taxpayers in the expanded district (Supp.Tr. 13-20). The District and its Board of Directors timely filed their Answer asserting the constitutionality of the statute and requesting the court for a declaratory judgment to that effect and to deny the injunctive relief sought by the taxpayers (Supp.Tr. 23-24). At the conclusion of the trial of the first cause, which was held before the court without the assistance of a jury, the court entered judgment in favor of the taxpayers (Supp.Tr. 25-27).

The cause was appealed timely to the Eastland Court of Civil Appeals and appeared on their docket as cause number 4735 styled *Stamford Hospital District, et al v. Billy Vinson, et al* (Supp.Tr. 50-54). The court entered Judgment on December 20, 1974, declaring the statute and election in question to be valid; denied the relief prayed for by the taxpayers; and reversed the trial court's judgment (Supp.Tr. 50-54). This decision, which is reported in 514 S.W.2d 358, was upheld by the Supreme Court of Texas on May 28, 1975, by overruling the Motion for Rehearing on the taxpayers' Application for Writ of Error. 18 Tex.Sup. Ct.Jr. 342.

A little over three months later on September 5, 1975, Petitioners here, B. J. Gist, Lem Ruark and Anita Harvey MacGregor represented by the same attorney who represented the taxpayers in the *Vinson* suite instituted this second suit for declaratory judgment and for injunctive relief by filing a petition almost identical to that of the first suit except for the names of the parties and the basis of the relief sought (Tr. 2-15). The constitutionality of the statute and election previously held valid in the *Vinson* suit was now being attacked by these Petitioners on the ground that the statute and election contravened the provisions of the Fourteenth Amendment of the Constitution of the United States (Tr. 2-15). This constitutional issue had not been raised in the *Vinson* suit but could have been raised there.

Following a hearing on the Motion for Summary Judgment, the court entered Judgment in favor of Respondents on the grounds that the *Vinson* suit is *res judicata* of the case at bar (Tr. 44-46).

Petitioners' pleadings in the trial court established that they are taxpaying property owners similarly situated in the expanded portion of the hospital district as were the taxpaying property owners who brought the *Vinson* suit (Tr. 2-15; Supp.Tr. 13-20). The depositions of Petitioners, which serve as a part of the summary judgment proof in support of the Motion for Summary Judgment, established the following undisputed facts:

All of the Petitioners were fully aware of the *Vinson* suit because they were aware of the public

meetings which were held to inform them and other property owners in the expanded portion of the District about the *Vinson* suit and to raise money to prosecute it (Ruark dep. 13-16; Gist dep. 10-11; MacGregor dep. 8-9). Petitioners Anita Harvey MacGregor and Lem Ruark contributed, or caused to be contributed, money to pay the attorneys' fees and expenses incurred in the *Vinson* suit (Ruark dep. 15, 17; MacGregor dep. 10). Petitioner Ruark stated in his deposition that he would have been a party of the *Vinson* suit "if they had needed" him (Ruark dep. 17). Finally, the deposition testimony recognized that the interests of all taxpayers in the District were represented in the *Vinson* suit in light of the statement by Mr. Ruark that he had asked the plaintiffs in the *Vinson* suit "whether we were going to win it or not" (Ruark dep. 13).

REASONS FOR NOT GRANTING THE WRIT

1.

The decision of the Texas courts that an earlier suit brought by taxpayers attacking the constitutionality of an Act of the Legislature of the State of Texas authorizing an expansion of the Stamford Hospital District upon obtaining proper voter approval and the election held on December 18, 1973 is *res judicata* of this cause brought by additional taxpayers attacking the same legislation and election on a different constitutional basis does not violate any right guaranteed the taxpayers by the Constitution of the United States.

The sole issue before this Honorable Court is whether or not the decision of the Texas courts that the *Vinson* suit is *res judicata* of the case at bar violates the rights of Petitioners here as guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The merits of the constitutional right asserted by Petitioners in the trial court are not before you. Only the procedure followed by the Texas courts is subject to review.

This Court has long held that "there has been a failure of due process *only*[1] in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interest of absent parties who are to be bound by it." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). The *Hansberry* opinion noted that it was a familiar doctrine of the Federal courts to bind absent members of a class to litigation where there is an identity of interest of the members of the class. 311 U.S. 42-43. The underyling rationale is clear that if an issue has been litigated in an earlier proceeding by one who stood in approximately the same shoes as does the party presently requesting relief, then nothing is lost to the subsequent party if the earlier judgment is treated as *res judicata*.

The record before this Honorable Court clearly establishes that the test set out in the *Hansberry* opinion is satisfied. The taxpayers in both suits were attacking the statute and the election. The rights alleged by the taxpayers in both suits are rights held in common by all of the taxpayers in the expanded portion of the

[1] Emphasis ours throughout, unless otherwise indicated.

district and not rights unique and peculiar to the individual taxpayers. The same attorney represented the taxpayers in both suits. The petition filed in the second suit was almost identical to the *Vinson* suit except that it alleged a Federal constitutional question. The identity of parties is further strenghtened in that Petitioners here were fully aware of the first suit and some of them even contributed money to the prosecution of the first suit. Petitioner Ruark recognized the identity of interest when he testified in his deposition that he had asked the taxpayers in the *Vinson* suit "whether we were going to win it or not" (Ruark dep. 13).

The decision of the Texas courts in this cause has its primary basis in the decision of *Cochran County v. Boyd*, Tex.Civ.App., 26 S.W.2d 364 (Amarillo, 1930), writ refused. The following language from the *Cochran County* opinion declaring the rule of law governing this cause and its reason for being illustrates why this rule of law is consistent with the test of this Court as enunciated in *Hansberry:*

> "The general rule is that, in the absence of fraud or collusion, a judgment for or against a county or other municipality is binding and conclusive upon all residents, citizens, and taxpayers, in respect to the matters adjudicated which are of general and public interests, and that *all other citizens and taxpayers similarly situated are virtually represented* in the litigation and bound by the judgment, and this applies especially to judgments relating to the validity of county bonds. 34 C.J. 1028 §1459.
>
> "The reason for this rule is stated by the same authority on page 1029, as follows: 'If this were not so, each citizen, and perhaps each citizen of each generation of citizens, would be at liberty to commence an action and to litigate the question for himself * * * If a judgment against the county in its corporate capacity does not bind the taxpayers composing the county, then, it would be difficult to imagine what efficacy could be given to such judgment.' " 26 S.W.2d 365-366.

The doctrine of virtual representation is not unique to Texas law, but is well established and followed throughout the United States. The Supreme Court of Missouri has recognized the importance of this doctrine as is seen from the following quote in its opinion of *Seibert v. City of Columbia*, Mo.Sup.Ct., 461 S.W.-2d 808, 811 (1971), to wit:

> "We are in full accord with the doctrine of virtual representation. It would be unthinkable in our system of jurisprudence to hold that each taxpayer of a municipality could bring a suit to attack an annexation and that *res judicata* would not apply because there was not an identity of parties. Of necessity, absent fraud or bad faith, all residents and taxpayers must be bound by the result of litigation of a public nature carried on by one in similar circumstances and having a common interest."

This rule of law upon which Respondents rest their case is a rule of the common law and thus has stood the test of time and served the people well. 40 Am.-Jur.2d 695-696 "Judgments" §539.

The doctrine of virtual representation by its very

definition does not bind persons who have personal rights that are peculiar to them and not held in common with the public at large. This is very well seen in the following quote from 50 Corpus Juris Secundum 338-339 "Judgments", §796, to wit:

> "The rule [res judicata by virtual representation] is frequently applied to judgments rendered in an action between certain residents or taxpayers and a state, municipality, county, or district, or board or officer representing it, it being held that all other citizens and taxpayers similarly situated are represented in the litigation and bound by the judgment, in the absence of fraud or collusion. The rule is applicable to persons who have notice of the suit, and even to persons without actual notice of the pendency of this suit.
>
> *The rule does not apply, however, to a person not a party with respect to his property or other private and individual rights not held in common with the public, nor does it apply to a taxpayer* who is not represented in the action or where the suit is not contested, although, where there is a real controversy, the fact that the suit is a friendly one is immaterial. *Of course, the rule does not apply to questions not passed on or to a suit on a different cause of action.*"

This Court has consistently held that where the doctrine of *res judicata* applies it covers not only the matters actually raised in the former suit but all matters which could have been raised. *Sea-Land Services v. Gaudet*, 414 U.S. 573, 573-579 (1974). The Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland, Texas, followed this statement of the law as is seen in the following quote from the opinion, to wit:

> " 'It is elementary that the prior suit are to be held to the rule that all issues and questions which could have been raised in such suit are now deemed to have been raised and litigated.' " 557 S.W.2d 557.

None of the authorities cited by Petitioners stand to the contrary of the preceding authorities. None of Petitioners authorities involved rights of the parties held in common with the public. All of the rights involved in those authorities were peculiar to the individuals there. Those decisions are sound and or not inconsistent with the doctrine of virtual representation which deals only with rights held in common by the public.

2.

The Act of the Legislature of the State of Texas authorizing the expansion of the Stamford Hospital District upon obtaining proper voter approval and the election held on December 18, 1973 do not transcend any right of the taxpayers guaranteed to them by the Constitution of the United States.

On April 25, 1977 this Honorable Court in cause number 76-1232 styled *C. E. Carter, et al v. Hamlin Hospital District, et al*, denied a petition for writ of certiorari wherein taxpayers attacking the expansion of the Hamlin Hospital District asserted the identical grounds for attacking Respondents in this cause. The

Court will note from its own records that the firm representing the petitioners in the *Carter* case is the same firm representing the Petitioners here. Therefore, based on the authority of *C. E. Carter, et al v. Hamlin Hospital District*, et al, 52 L.ed.2d 378, the Petition for Writ of Certiorari should be denied.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondents pray that this Honorable Court refuse to grant a Writ of Certiorari in this cause and by so refusing affirm the Judgments of the Courts of the State of Texas.

Respectfully submitted,

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Fort Worth, Texas 76102

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Attorney for Respondents

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of this Response to Petition for Writ of Certiorari has been served upon counsel for Petitioners, Mr. Frank Scarborough and Mr. J. R. Black, Jr., P. O. Box 356, Abilene, Texas, 70604, by placing the same in the United States Mail, properly addressed and postage prepaid on this 31st of May, 1978.

J. Shelby Sharpe
Attorney for Respondents